

A real conundrum: The Civil Justice Reform Act post Johnson

By Scott Strauss

The latest constitutional challenge to the Civil Justice Reform Act of 2003, *Johnson v. Rockwell*, 2009 Ark 241, 2009 Ark. Lexis 274 (April 30, 2009), produced a conundrum that more than a year later has yet to be resolved. The court affirmed the legislative change in substantive law from "joint and several" liability to "several" liability; but, struck down the procedural law implementing that change. The court ruled the General Assembly's attempt to supply a procedure by which to implement the change from "joint and several" liability to several liability was unconstitutional because the power to implement procedure is constitutionally vested in the courts, not the legislative body.

The court's decision leaves unanswered the question of how a defendant who is a proximate cause of the plaintiff's damages; but, not the sole proximate cause, limits his liability to his own share of fault? Because the court staked its exclusive claim to procedural rule making authority, it must now exercise that authority. It must now create a procedure implementing the substantive change from "joint and several" liability to "several" liability. Otherwise, there has been no change.

The Arkansas Civil Justice Reform Act, Act 649 of 2003, incorporated a number of provisions concerning apportionment of both liability and damages. In general terms, Arkansas Code Annotated § 16-55-201 provided for several rather than joint and several liability. The statute, in its entirety, reads as follows:

(a) In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.

(b)(1) Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault.

(2) A separate several judgment shall be rendered against that defendant for that amount.

(c) (1) To determine the amount of judgment to be entered against each defendant, the court shall multiply the total amount of damages recoverable by the plaintiff with regard to each defendant by the percentage of each defendant's fault.

(2) That amount shall be the maximum recoverable against that defendant.

The next provision, Arkansas Code Annotated § 16-55-202, provided for the apportionment of fault among

non-parties and supplied a framework by which to identify those non-parties, the filing of pleadings identifying the non-parties. However, in *Johnson v. Rockwell Automation, Inc.*, 2009 ARK 241, 2009 Ark. Lexis 274 (April 30, 2009), the Arkansas Supreme Court ruled Arkansas Code Annotated § 16-55-202 was an unconstitutional violation of the separation of powers doctrine which reserves to the courts the sole authority to govern pleading, practice, and procedure...1 In the same opinion, the court went on to state: :

Clearly the law modifying joint and several liability, Arkansas Code Annotated ' 16-55-201, defines the right of a party, a defendant, and is substantive.

Stated simply, the Arkansas Supreme Court ruled that the procedure set forth in Arkansas Code Annotated § 16-55-202 by which one identifies and apports fault to non-parties was an unconstitutional intrusion upon the court's exclusive authority to govern procedure; but, at the same time, recognized the change from joint and several liability

to several liability set forth in Arkansas Code Annotated § 16-55-201 was a substantive change within the General Assembly's authority; and, consequently, not in violation of the Arkansas Constitution.

The clear impact of the court's ruling in 'Johnson is to leave in place the General Assembly's intent that any one defendant not be required to pay more than its share of liability as set forth in Arkansas Code Annotated § 16-55-201.2 This of course leaves the question, in the absence of the non-party fault process contained in the now stricken ' 16-55-202, of how to instruct a jury to assure that a defendant pay only its share of fault. In other words, consistent with the ruling of the Arkansas Supreme Court reserving issues of procedure solely to the courts, the courts must now develop a procedure enforcing or enacting the substantive change from joint and several liability to several liability set forth by the General Assembly in Arkansas Code Annotated § 16-55-201.

Conundrum For The Courts

The Arkansas Supreme Court's decision in *Johnson*, supra creates a conundrum by deeming the several liability portion of the Civil Justice Reform Act3 constitutional; but, at the same time, holding the non-party apportionment statute4 unconstitutional. Specifically, if juries are not allowed to apportion fault to non-parties, what steps must the court take to ensure that a single tortfeasor,

with less than 100 percent of any applicable fault, pays only its several share of liability?

The current state of the law, post *Johnson*, is at best confusing and can be summed thusly: A defendant in Arkansas is liable only for his portion of fault; though, a jury may not apportion fault to non-parties and an apportionment among parties must equal 100 percent of the total fault. Clearly, following the court's ruling in *Johnson*, it is incumbent upon the court to craft a procedure carrying forth the substantive law of several liability.

(Endnotes)

1 Ark. Const. Amend. 80, § 3.

2 *Subject of course to the post-judgment shifting based upon a defendant's ability to satisfy its share of the verdict as set forth in Arkansas Code Annotated § 16-55-203.*

3 *Arkansas Code Annotated § 16-55-201.*

4 *Arkansas Code Annotated § 16-55-202.*

Scott Strauss is an attorney with the Barber Law Firm of Little Rock. He concentrates his practice in the areas of insurance defense litigation, insurance coverage, aviation law, commercial litigation, ERISA, and labor and employment law. He can be reached at scotts@barberlawfirm.com. ♦